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## Proposed Regulation Agency Background Document

<b>Agency name</b>	Board of Nursing, Department of Health Professions
<b>Virginia Administrative Code (VAC) citation</b>	18VAC90-25-10 et seq.
<b>Regulation title</b>	Regulations Governing the Certification of Nurse Aides
<b>Action title</b>	Funding shortfall for CNA program
<b>Document preparation date</b>	12/2/04

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Brief summary

*In a short paragraph, please summarize all substantive changes that are being proposed in this regulatory action.*

The Board is proposing an increase in the biennial renewal fee for certified nurse aides from \$45 to \$50.

### Legal basis

*Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.*

Regulations are promulgated under the general authority of Chapter 24 of Title 54.1 of the Code of Virginia. Section 54.1-2400 (5) provides the Board with a duty to levy and collect fees and (6) provides the authority to promulgate regulations to administer the regulatory system:

**§ 54.1-2400 -General powers and duties of health regulatory boards**

*The general powers and duties of health regulatory boards shall be:*

*5. To levy and collect fees for application processing, examination, registration, certification or licensure and renewal that are sufficient to cover all expenses for the administration and operation of the Department of Health Professions, the Board of Health Professions and the health regulatory boards.*

*6. To promulgate regulations in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.) which are reasonable and necessary to administer effectively the regulatory system. Such regulations shall not conflict with the purposes and intent of this chapter or of Chapter 1 (§ 54.1-100 et seq.) and Chapter 25 (§ 54.1-2500 et seq.) of this title.*

The federal mandate for a nurse aide registry is found in the Omnibus Budget Reconciliation Act of 1987 (OBRA '87), which set out certain requirements for long term care that must be met in order to receive Medicare and Medicaid funding. States are directed to establish a Nurse Aide Registry, set minimal standards for nurse aide education and competency testing for certification, and keep permanent records of findings of abuse, neglect and misappropriation of resident property. The federal legislation also prohibits a state from charging any fee to place a nurse aide on the registry. In 1989, the General Assembly directed the Board of Nursing to implement OBRA requirements (see Article 4 of Chapter 30 of Title 54.1).

**Purpose**

*Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal and the problems the proposal is intended to solve.*

One of the tenets of public safety is the societal interest in assuring that vulnerable persons are safe. Vulnerability is the hallmark of persons in long-term nursing and assisted living facilities and those in need of daily care in the home. They are the most vulnerable of patients. Yet, it is these persons who are every day left in the care and supervision of the lowest paid and least trained health care providers – nurse aides. Actions taken to discipline nurse aides are analogous to the prosecution of criminals who abuse, assault, or rob citizens. Therefore, it is in the public’s interest to ensure that sufficient funding is available to protect the chronically feeble and infirm through the investigation and adjudication of certified nurse aides.

The Board of Nursing has struggled with funding for the nurse aide programs for a number of years. While the disciplinary caseload has continued to grow, funding provided from the Department of Medical Assistance Services (DMAS) through Medicaid for the Certified Nurse Aide (CNA) program has been reduced over the past few years. Beginning in FY’05, if no action is taken, it is projected that the program would incur a deficit of approximately \$400,000. By FY 2009-10 the effect of the reduction in Medicaid funding and inaction by the Board would be a cumulative shortfall in the Nurse Aide budget of approximately \$3 million.

As a special fund agency, the Board of Nursing is mandated to levy fees sufficient to cover all expenses for the administration and operation of the board and the Department of Health Professions. Therefore, action must be taken to address the current and projected shortfall in the Nurse Aide budget.

**Substance**

*Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (More detail about these changes is requested in the "Detail of changes" section.)*

The Board is proposing an increase in the biennial renewal fee for certified nurse aides from \$45 to \$50.

**Issues**

*Please identify the issues associated with the proposed regulatory action, including:*

- 1) *the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
- 2) *the primary advantages and disadvantages to the agency or the Commonwealth; and*
- 3) *other pertinent matters of interest to the regulated community, government officials, and the public.*

*If the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.*

1) The primary advantage to the public of implementing the amended provisions is the availability of sufficient funding to continue the investigation and adjudication of disciplinary cases involving abuse, neglect or misappropriation of property by certified nurse aides. Without funding for the nurse aide program, complaints may not be fully investigated and disciplinary actions taken against nurse aides who may prey on elderly or disabled persons. At the same time, the very modest increase in the biennial renewal fee should not decrease the number of persons who are willing to seek certification or who are working in long term care. There are no disadvantages to the public.

2) The primary advantage to the agency is an increase in revenue to apply toward the deficit in funding for the nurse aide program. There are no disadvantages, since the combination of nursing and nurse aide budgets can be accomplished while continuing to identify separate revenue and expenditure streams.

**Economic impact**

*Please identify the anticipated economic impact of the proposed regulation.*

<p><b>Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures</b></p>	<p>a) As a special fund agency, the Board must generate sufficient revenue to cover its expenditures from non-general funds, specifically the renewal and application fees it charges to practitioners for necessary functions of regulation; b) The agency will</p>
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	incur some one-time costs (less than \$1,000) for mailings to the Public Participation Guidelines mailing lists, conducting a public hearing, and sending notice of final regulations to regulated entities. Every effort will be made to incorporate those into anticipated mailings and Board meetings already scheduled. There are no on-going expenditures to implement and enforce the proposed regulation.
<b>Projected cost of the regulation on localities</b>	There are no costs to localities
<b>Description of the individuals, businesses or other entities likely to be affected by the regulation</b>	The individuals affected by the regulation would be certified nurse aides who must maintain certification to work in a long-term care facility receiving Medicare or Medicaid funding.
<b>Agency's best estimate of the number of such entities that will be affected</b>	There are approximately 40,000 certified nurse aides in Virginia
<b>Projected cost of the regulation for affected individuals, businesses, or other entities</b>	The projected cost of the regulation would be \$5 every two years.

**Alternatives**

*Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action.*

To address the shortfall in the CNA budget, there were four basic options:

1. Reduce program expenditures
2. Increase the Medicare/Medicaid funding cap
3. Obtain a general fund appropriation
4. Increase fees charged by the Board of Nursing

Reduce Expenditures

Reducing expenditures related to the nurse aide program is very problematic. The single biggest cost driver is the investigation and adjudication of allegations of misconduct. The following chart illustrates the nurse aide disciplinary caseload trend.

Biennium	Cases Received	Cases Closed
1992-94	836	638
1994-96	678	893
1996-98	521	749
1998-00	1089	934
2000-02	1329	1187
2002-04	1210	1286

Certified nurse aides are accused of misconduct at a significantly higher rate than any other profession regulated by the Board of Nursing. One out of every 32 certified nurse aides had a complaint made against him or her in 2002-04. For nurses (RNs and LPNs), however, only 1 out of every 83 licensees generated a complaint in that same time period. Clearly, therefore, the per capita cost of regulating nurse aides is significantly more than any other profession within the Board of Nursing.

The investigation and adjudication of allegations of misconduct against nurse aides represent more than 40% of the total CNA program expenditures. Because of their nature, non-disciplinary related expenditures are fixed costs that can not be changed without impacting the other boards within DHP. Only those expenses related to the investigation and adjudication of allegations of misconduct have any discretionary elements. Effectively, therefore, reducing program expenditures can only be accomplished at the expense of the investigation and adjudication of complaints against nurse aides.

Considering the population served by nurse aides – particularly those in long-term care and assisted living facilities where nurse aides provide the bulk of direct, day-to-day patient and resident care – the public fallout associated with such a reduction in disciplinary effort and the associated negative publicity could be very significant.

#### Increase Funding Cap

The situation facing the CNA program has its roots in the reduction in Medicaid and Medicare funding in the mid-1990s. One potential option to address this situation is to seek an increase in the Medicare/Medicaid allocation formula. Such an action, though, may not be accomplished without some significant statewide policy changes regarding Medicare and Medicaid programs, and would require the approval of CMS.

#### General Fund Appropriation

It is readily acknowledged that nurse aides are in the lowest paid profession regulated by the Department of Health Professions. Nevertheless, it is the nurse aide who provides the majority of direct, day-to-day care of residents of nursing homes and assisted living facilities.

The high rate of reported misconduct against nurse aides demonstrates a compelling argument for the need for public safety. Because the rate of reported misconduct among nurse aides exceeds the rate of complaints against other care givers and because of the very limited ability of nurse aides as a group to fund activities intended to improve discipline within their profession, general fund consideration may be viewed as an acceptable exception to the traditional funding mechanisms for successful occupational regulation. A modest general fund appropriation may be included in the Governor's proposed budget but would be limited and would be unlikely to provide a long-term solution.

#### Increase Renewal and Program Fees

The current biennial renewal fee for a Certified Nurse Aide is \$45.00. Without any supplemental funding, the biennial renewal fee would have to be increased to approximately \$90.00 by the end of FY 2004-05. This would double the current renewal fee – a tremendous burden for the lowest paid health care providers regulated by the department. There was a significant concern that such a large

increase would cause a major reduction in the number of nurse aides willing to renew their certificates, particularly at time when there is an acknowledged shortage in the nursing field.

Another option that the Board discussed was to institute fees for the oversight of nurse aide education programs. There are approximately 250 nurse aide educational programs in Virginia. State law requires that the course requirement, curriculum content, and objectives for each of these programs be approved by the Board of Nursing. The approval process includes an on-site visit of each facility once every two years. Presently, there is no fee required for the approval and review process for nurse aide educational programs. While instituting a fee for these programs could offset the cost of their oversight, a number of these programs reside in high schools or community colleges, so program fees would increase the cost of public education and could not be sufficient to resolve the funding shortage in the nurse aide program.

**Additional Option:** Combined Budget for Nursing and Nurse Aides

Traditionally, the Board of Nursing has held CNA revenues and expenditures completely separate from the other professions regulated by the Board. State law<sup>1</sup>, however, only requires the various health regulatory boards to balance their revenues and expenditures by board, not by individual professions within each board. This creates the opportunity to discontinue the traditional accounting distinction within the Board of Nursing, thus allowing the management of BON revenues and expenditures as one combined “pot” of money. This, in turn, would allow the agency to use fees collected from the other professions regulated by the BON – principally RNs and LPNs – to help support the CNA program.

With the implementation of this option, a fee increase would still be necessary for CNAs, but at a much lower level. Current projections indicate that recent fee increases for RNs and LPNs adopted to accommodate the requirements of HB 1441 (2003) and to implement of the Nurse Compact will be sufficient over the next 3 biennia to provide supplemental funding for the CNA program. Nurse aide renewal fees could be increased by \$5/biennium and the Board would still be able to balance its budget through FY 2009-10. At its meeting on November 16, 2004, the Board voted to approve accounting that would keep the funding and expenditures separated but allow the two to balance through a combined budget.

In summary, the Board was presented with 10 options ranging from taking no action to doubling of CNA fees. The option (see table below) that was adopted included the following features: 1) an increase in the biennial renewal fee of \$5; 2) a combined budget for the Board of Nursing being with FY’07; 3) a General Fund appropriation of \$114,000 in FY’05 and \$203,000 in FY’06; and no increase or reduction in federal funding over the next 3 biennia.

CNA Direct and Allocation Expenditures w\ Cash Balances  
 Revised Budget FY 05 & FY06 and Projected FY07 through FY10  
 \$50 Biennial Fee - General Fund FY05 and FY06 Only

CNA	Nursing	Combined
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<sup>1</sup> See §§ 54.1-113 and 54.1-2400 (5), *Code of Virginia*

Budget FY05	
Cash Balance as of June 30, 2004	106,249
Revenue Fees	778,040
General Fund	114,000
Federal Reimbursement	625,158
Total Expenditures	<u>1,909,440</u>
Projected Cash Balance as of June 30, 2005	<u>(285,993)</u>

Budget FY06	
Projected Cash Balance as of June 30, 2005	(285,993)
Revenue Fees	657,055
General Fund	203,000
Federal Reimbursement	625,158
Total Expenditures	<u>1,954,779</u>
Projected Cash Balance as of June 30, 2006	<u>(755,559)</u>

Projected FY07			
Projected Cash Balance as of June 30, 2006	(755,559)	4,624,240	
Revenue Fees	888,600	6,549,682	7,438,282
General Fund	-		-
Federal Reimbursement	625,158		625,158
Total Projected Expenditures	<u>1,758,076</u>	<u>6,044,736</u>	<u>7,802,812</u>
Projected Cash Balance as of June 30, 2007	<u>(999,877)</u>	<u>5,129,186</u>	<u>4,129,309</u>

Projected FY08			
Projected Cash Balance as of June 30, 2007	(999,877)	5,129,186	4,129,309
Revenue Fees	710,700	6,382,730	7,093,430
General Fund	-		-
Federal Reimbursement	625,158	-	625,158
Total Projected Expenditures	<u>1,810,818</u>	<u>6,346,972</u>	<u>8,157,790</u>
Projected Cash Balance as of June 30, 2008	<u>(1,474,837)</u>	<u>5,164,944</u>	<u>3,690,107</u>

Projected FY09			
Projected Cash Balance as of June 30, 2008	(1,474,837)	5,164,944	3,690,107
Revenue Fees	913,700	6,647,928	7,561,628
General Fund	-		-
Federal Reimbursement	625,158	-	625,158
Total Projected Expenditures	<u>1,865,143</u>	<u>6,537,382</u>	<u>8,402,525</u>

Projected Cash Balance as of June 30, 2009	(1,801,122)	5,275,490	3,474,367
Projected FY10			
Projected Cash Balance as of June 30, 2009	(1,801,122)	5,275,490	3,474,367
Revenue Fees	730,500	6,478,471	7,208,971
General Fund	-		-
Federal Reimbursement	625,158	-	625,158
Total Projected Expenditures	1,921,097	6,733,503	8,654,600
Projected Cash Balance as of June 30, 2010	(2,366,562)	5,020,458	2,653,896

**Public comment**

*Please summarize all comments received during public comment period following the publication of the NOIRA, and provide the agency response.*

The Notice of Intended Regulatory Action was published on September 20, 2004 with comment received until October 20, 2004.

Commenter	Comment	Agency response
Connie Davis, Director of Nurse Aide Program at Southwest Virginia Community College	Hoped that other actions could be taken so the nurse aide fees would not have to be increased. Concern that an increase would decrease the number of people who would apply.	The Board concurred with the comment and concern and acted to limit the increase to \$2.50 a year.

**Family impact**

*Please assess the impact of the proposed regulatory action on the institution of the family and family stability.*

There is a potential impact on the institution of the family or on family stability for failure to take regulatory action, which would likely result in a significant reduction in expenditures related to the investigation and adjudication of complaints against nurse aides for abuse, neglect, and misappropriation of property. That would leave the most vulnerable members of families subject to neglect or mistreatment by some persons who should have been removed from the Registry but would be able to continue in practice. On the other hand, the Board realized that any significant increase in fees for certified nurse aides would have a negative effect on their ability to support themselves and their families and could represent a real hardship to persons who are making little more than minimum wage. Therefore, the fee increase is minimal (\$5 per biennium) and should have little or no impact on nurse aides and their families.

**Detail of changes**

*Please detail all changes that are being proposed and the consequences of the proposed changes. Detail all new provisions and/or all changes to existing sections.*

*If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all changes between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.*

<b>Current section number</b>	<b>Proposed new section number, if applicable</b>	<b>Current requirement</b>	<b>Proposed change and rationale</b>
80	n/a	The required fee for renewal every two years is \$45.	<p>The required fee for renewal every two years would be \$50.</p> <p><i>While the increase in the renewal fee will not begin to address the projected shortfall, it is necessary for nurse aides to partially support the regulatory and disciplinary burden of the board through their fees. An increase of \$2.50 a year for a professional certificate should not present a financial burden to the nurse aides nor deter an individual from entering the profession.</i></p>